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Supreme Court of the United States.

No. 109.—October Term, 1902.

The Mutual Life Insurance Company of New York, Plaintiff in Error, *vs.* Alphonsine McGrew. } In error to the Supreme Court of the State of California.

[February 23, 1903.]

This is a writ of error to revise the judgment of the Supreme Court of the State of California, affirming a judgment of the Superior Court of the city and county of San Francisco in favor of Alphonsine McGrew and against the Mutual Life Insurance Company of New York. 132 Cal. 85.

The action was brought on a policy of insurance payable to Alphonsine C. McGrew, and in the amended answer to the complaint the recovery of a decree of divorce was averred, and it was alleged: "That under and by virtue of the Hawaiian law in force at the time said decree of divorce was granted and now in force, it is provided: 'When a divorce is decreed for the adultery or other offense amounting thereto, of the wife, the husband shall hold her personal estate forever, and he shall hold her real estate so long as they shall live; and if he shall survive her, and there shall be issue of the marriage born alive, he shall hold her real estate for the term of his own life, as a tenant by the curtsey; provided that the court may make such reasonable provision for the divorced wife out of any real estate that may have belonged to her, as it may deem proper.' That under and by virtue of the foregoing provision of law, and decree of divorce, all rights of the said Alphonsine C. McGrew in and to said policy of insurance did pass to the said Henri Golden McGrew and become his absolute property free and clear of any claims of the said Alphonsine C. McGrew, plaintiff herein, whatsoever."

The amended answer also averred that after McGrew's death, one Carter was duly appointed in Hawaii administrator of his estate; that as such administrator he commenced suit against the insurance company in a Circuit Court of Hawaii on the policy of insurance; recovered judgment October 15, 1895, for the full amount; that the Supreme Court of Hawaii affirmed the judgment, and subsequently denied an application for rehearing, and that the judgment was thereafter paid.

The trial court made findings of fact as follows:

"1. On the 14th day of September, 1892, this defendant made, executed, and delivered to Henri G. McGrew, a certain policy of insurance, being the same policy mentioned in the complaint herein, wherein and whereby the said defendant promised and agreed to pay unto the plaintiff, Alphonsine McGrew, the sum of five thousand dollars ($5,000.00), upon the death of the said Henri G. McGrew, during the continuance of said policy of insurance, provided said Alphonsine McGrew were living at the time of the death of said Henri G. McGrew, and upon acceptance of satisfactory proof of the death of said Henri G. McGrew, during the continuance of said policy.

"2. Henri G. McGrew died on the 22d day of October, 1894, in Honolulu, Hawaiian Islands, and said plaintiff survived him.

"3. Said Henri G. McGrew, upon said 14th day of September, 1892, and continuously and up to the time of his death, was a resident of, and domiciled in, the Hawaiian Islands.

"4. On the 9th day of February, 1895, plaintiff presented to said defendant satisfactory proof of the death of said Henri G. McGrew, and demanded of said defendant the payment of the sum of five thousand ($5,000.00) dollars, under and in accordance with the terms of said policy of insurance, but defendant has never paid the same, or any part thereof.

"5. Subsequent to the said 14th day of September, 1892, and prior to the 8th day of February, 1894, the said Henri G. McGrew became of unsound mind, and thereafter, upon due proceedings had, Charles L. Carter, residing in the city of Honolulu, was duly appointed the guardian of the person and estate of said Henri G. McGrew, an incompetent person, and continued to hold such office of guardian at the time of the filing of the libel of divorce, and the proceedings thereunder hereinafter mentioned.

"6. On the 8th day of February, in the year 1894, Charles L. Carter, as guardian and on behalf of Henri G. McGrew, an incompetent person, filed in the Circuit Court of the first judicial circuit of the Republic of Hawaii, which said court has jurisdiction over said parties and over libels for divorce, a libel praying for a divorce from said plaintiff on the ground of her adultery; and thereafter, and on the 11th day of April, 1894, this plaintiff being then a resident of, and domiciled in, said Hawaiian Islands, appeared in said action and contested the same.

"7. On the 23d day of August, 1894, a decision was rendered, and on the 24th day of August, 1894, a decree was signed in said cause by the said Circuit Court, dissolving the bonds of matrimony theretofore existing between said Henri G. McGrew and this plaintiff, upon the ground of the adultery of this plaintiff.

"8. On the 5th day of April, 1894, this plaintiff left the Hawaiian Islands with the intention of not returning to said islands, but of coming to the State of California and of making her home in, and permanently residing in, said State. And thereafter, and in due course of her voyage from the Hawaiian Islands and in said month of April, this plaintiff arrived in the State of California, and with said intention above mentioned, thereupon took up her residence in, and made her home in, said State, and with said intention has ever since continuously remained in, and resided in, and made her home in, said State of California; and on the 23d and 24th days of August, 1894, was actually in, and residing in, said State,

with the intention above mentioned of permanently residing and making her home in said State of California.

"9. Prior to said 5th day of April, 1894, this plaintiff had been excluded by said Charles L. Carter, as such guardian, from the home of said Henri G. McGrew, and was by him thereafter prevented from returning, and has ever since and until the death of said Henri G. McGrew been by him prevented from returning to the same, and was, on said 5th day of April, excluded from said home by said guardian.

"10. On said 5th day of April, 1894, this plaintiff had no home, and has never since had a home in the Hawaiian Islands."

[Findings 11, 12, 13, 14, 16 and 17 referred to the filing of a bill of exceptions by Mrs. McGrew in the divorce suit, and the statute and rule of court of Hawaii in respect of the practice in relation thereto.]

"15. The following Hawaiian law was in force in the Hawaiian Islands at the time said decree of divorce was granted, to wit: When a divorce is decreed for the adultery or other offense amounting thereto of the wife, the husband shall hold her personal estate forever."

And the court concluded as matter of law that the rights of Mrs. McGrew in and to the policy and the moneys due thereunder never passed to her husband, nor did the policy or money due thereunder ever become his property; and that the insurance company was indebted to Mrs. McGrew on said policy in the sum of $5,000 and interest. Judgment was rendered accordingly October 11, 1897, and the case was carried to the Supreme Court of the State, and the record filed therein December 13, 1897. The judgment was affirmed February 28, 1901, and a petition for rehearing denied. 132 Cal. 85. This writ of error was allowed by the Chief Justice of that court.

The Supreme Court of California held that the construction given by the courts of the Republic of Hawaii to the statute of that republic that permitted an action for a divorce to be maintained by the guardian of an incompetent person should be accepted, although such was not the law of California, and that the judgment of divorce rendered in that republic, in pursuance of the statute so construed, should, by comity, be given effect by the courts of California as a decree of divorce; that the statute of Hawaii declaring that, where a divorce is decreed for the adultery of the wife, the husband shall take her personal estate, could have no operation pending the suit for divorce, and not until after the entry of judgment; that Mrs. McGrew was bound by the decree of divorce in Hawaii, so far as the dissolution of the bond of matrimony was concerned, she having appeared to the action; that when a husband commences a suit for divorce, the wife may acquire a separate actual domicil by change of residence from one country to another pending the suit; that Mrs. McGrew became domiciled in California prior to the entry of the decree, and that the statute of Hawaii declaring the forfeiture of her personal property to the husband could not operate in California to affect her, or to give to the

husband a policy of insurance, which, by its terms, was payable to her, and which, at the time of the decree, was governed by the law of her domicil in California. No allusion whatever was made by the Supreme Court to the treaty between Hawaii and the United States.

The decisions of the Supreme Court of Hawaii are reported, *McGrew, a person non compos, by his Guardian, Charles L. Carter,* v. *Alphonsine McGrew,* 9 Hawaii, 475; *McGrew &c.* v. *McGrew,* 10 Hawaii, 600; *Carter* v. *Mutual Life Insurance Company,* 10 Hawaii, 117; *S. C.,* Id. 559; *S. C.,* Id. 562.

In the opinion on the last hearing, December 16, 1896, the court observed: "The company, not having brought the widow into court by interpleader, is in the unfortunate position of being subjected to two suits—one by the administrator here, the other by the widow in California. It must now rely on the assumption that the two courts will take the same view of the law." The court also considered the point that the statute in question, section 1331 of the Civil Code, was repealed by implication by the Married Women's act of 1888. But it held that the section was not inconsistent with that act, and that it might "be regarded as a special provision for a penalty or forfeiture in case of a divorce for the offense of adultery." And the court said that it was glad to know that the section had been repealed. Section 1331 was repealed May 12, 1896, (Laws Hawaii, 1896, p. 70, Act 24.)

Article VIII of the treaty between the United States and the Kingdom of Hawaii was as follows:

"The contracting parties engage, in regard to the personal privileges, that the citizens of the United States of America shall enjoy in the dominions of his Majesty, the King of the Hawaiian Islands, and the subjects of his said Majesty in the United States of America, that they shall have free and undoubted right to travel and to reside in the states of the two high contracting parties, subject to the same precautions of police which are practiced towards the subjects or citizens of the most favored nations. They shall be entitled to occupy dwellings and warehouses, and to dispose of their personal property of every kind and description, . . . and their heirs or representatives, being subjects or citizens of the other contracting party, shall succeed to their personal goods, whether by testament or *ab intestato*; and may take possession thereof, either by themselves or by others acting for them, and dispose of the same at will, paying to the profit of the respective governments, such dues only as the inhabitants of the country wherein the said goods are shall be subject to pay in like cases. And in case of the absence of the heir and representative such care shall be taken of the said goods as would be taken of the goods of a native of the same country in like case, until the lawful owner may take measures for receiving them. And if a question should arise among several claimants as to which of them said goods belonged, the same shall be decided finally by the laws and judges of the land wherein the said goods are. Where, on the decease

of any person holding real estate within the territories of one party, such real estate would, by the laws of the land, descend on a citizen or subject of the other, where he not disqualified by alienage, such citizen or subject," &c. 9 Stat. 977.

Mr. Chief Justice FULLER delivered the opinion of the Court:

Appellate jurisdiction was conferred on this court by the twenty-fifth section of the judiciary act of 1789, over final judgments and decrees in any suit in the highest court of law or equity of a State in which a decision in the suit could be had, in three classes of cases: The first class was where the validity of a treaty or statute of, or an authority exercised under, the United States, was drawn in question, and the decision was against their validity; the second was where the validity of a statute of, or an authority exercised under, any State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, was drawn in question, and the decision was in favor of their validity; and the third was "or where is drawn in question the construction of any clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision is against the title, right, privilege or exemption specially set up and claimed by either party under such clause of the said Constitution, treaty, statute or commission." 1 Stat. 73, 85, c. 20, § 25.

By the second section of the act of February 5, 1867, (14 Stat. 385, 386, c. 28,) the original twenty-fifth section was re-enacted with certain changes, and, among others, the words just quoted were made to read: "Or where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of or commission held, or authority exercised under the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed by either party under such Constitution, treaty, statute, commission, or authority." And this was reproduced in § 709 of the Revised Statutes. The change from the drawing in question of the construction of a clause of the Constitution, or of a treaty, statute, or commission, to the claim of a right under the Constitution, treaty, statute, commission, or authority, emphasized the necessity that the right must be specially set up, and denied.

In *Baltimore & Potomac Railroad Company* v. *Hopkins*, 130 U. S. 210, the distinction between the denial of validity and the denial of a title, right, privilege or immunity specially set up or claimed, is pointed out, as well as the distinction between the construction of a statute or the extent of an authority and the validity of a statute or of an authority.

Our jurisdiction of this writ of error is asserted under the third of the classes of cases enumerated in § 709, and it is thoroughly settled that in order to maintain it, the right, title, privilege or immunity relied on must

not only be specially set up or claimed, but at the proper time and in the proper way.

The proper time is in the trial court whenever that is required by the State practice, in accordance with which the highest court of a State will not revise the judgment of the court below on questions not therein raised. *Spies* v. *Illinois*, 123 U. S. 131; *Jacobi* v. *Alabama*, 187 U. S. 133; *Layton* v. *Missouri*, 187 U. S. ; *Erie Railroad Company* v. *Purdy*, 185 U. S. 148.

The proper way is by pleading, motion, exception, or other action, part, or being made part, of the record, showing that the claim was presented to the court. *Loeb* v. *Trustees*, 179 U. S. 472, 481. It is not properly made when made for the first time in a petition for rehearing after judgment; or in the petition for writ of error; or in the briefs of counsel not made part of the record. *Sayward* v. *Denny*, 158 U. S. 180; *Zadig* v. *Baldwin*, 166 U. S. 488. The assertion of the right must be made unmistakably and not left to mere inference. *Oxley Stave Company* v. *Butler County*, 166 U. S. 648.

If the highest court of a State entertains a petition for rehearing, which raises Federal questions, and decides them, that will be sufficient; *Mallett* v. *North Carolina*, 181 U. S. 589; or if the court decides a Federal question which it assumes is distinctly presented to it in some way. *Home for Incurables* v. *New York*, 187 U. S. 155; *Sweringen* v. *St. Louis*, 185 U. S. 46.

Jurisdiction may be maintained where a definite issue as to the possession of the right is distinctly deducible from the record and necessarily disposed of, but this cannot be made out by resort to judicial knowledge. *Powell* v. *Brunswick County*, 150 U. S. 433; *Mountain View Mining & Milling Company* v. *McFadden*, 180 U. S. 533; *Arkansas* v. *Kansas and Texas Coal Company*, 183 U. S. 185.

Counsel by their specification of errors, under rule 21, assert the Federal questions to be that the decision of the Supreme Court of California was against a title, right, privilege or immunity claimed by plaintiff in error under the treaty between the United States and Hawaii. And that the decision was in contravention of section 1 of Article IV of the Constitution.

1. We do not find that any claim under the treaty was made in the trial court, and the rule of practice of the Supreme Court of California is that it will not pass on questions raised for the first time in that court, and which might and should have been raised in the trial court. *Stoddard* v. *Treadwell*, 29 Cal. 281; *King* v. *Myer*, 35 Cal. 646; *Deady* v. *Townsend*, 57 Cal. 298; *Williams* v. *McDonald*, 58 Cal. 587; *Anderson* v. *Black*, 70 Cal. 226, 231.

Neither the pleading of the decree of divorce nor of the statute of Hawaii providing for the forfeiture of Mrs. McGrew's rights in the policy of insurance, as construed by the Supreme Court of Hawaii, nor of both together, amounted to specially asserting any right under the treaty. Those averments did not assert that claim in the trial court in such manner as to bring it to the attention of that court, nor indeed, to show that any right under the treaty was present in the mind of counsel.

To give them that effect would be in the teeth of our decision in *Oxley Stave Company* v. *Butler County*, and numerous other decisions. That case involved a decree, in respect of which there was a general allegation that it was rendered against dead persons, as well as in the absence of necessary parties who had no notice of the suit; and we held that such general allegations did not meet the statutory requirement that the final judgment of a State court may be re-examined here if it denies some title, right, privilege, or immunity "specially set up or claimed" under the Constitution or authority of the United States. Mr. Justice Harlan said: "This statutory requirement is not met if such declaration is so general in its character that the purpose of the party to assert a Federal right is left to mere inference. It is the settled doctrine of this court that the jurisdiction of the Circuit Courts of the United States must appear affirmatively from the record, and that it is not sufficient that it may be inferred argumentatively from the facts stated. . . . Upon like grounds the jurisdiction of this court to re-examine the final judgment of a State court cannot arise from mere inference, but only from averments so distinct and positive as to place it beyond question that the party bringing a case here from such court intended to assert a Federal right."

This also disposes of the suggestion that the offering in evidence of the judgment in the suit by the administrator, and of evidence of its payment, raised a Federal question under the treaty, for no such ground was taken in relation to that evidence, to say nothing of the fact that Mrs. McGrew was not a party to that suit.

In the bill of exceptions there is an enumeration of certain objections to the entry of judgment and certain errors of law alleged to have occurred during the trial, and to have been excepted to by defendant, which embraces the objection that the decision of the trial court was against law, because, among other things, the findings of fact did not determine the issues raised by the allegation in the answer quoted in the statement preceding this opinion, and that the court erred in sustaining the objection of plaintiff to the introduction of evidence of payment by the company to the administrator of the amount due on the policy. But there is no reference to the treaty, and all this no more set up the claim than the answer itself.

In fact, the question was not even raised in the Supreme Court, though, if so, the court was not then bound to regard it. Reference was made in the briefs in the Supreme Court to the treaty, but those references did not specially set up or claim any right as secured by the treaty, nor were the briefs made part of the record by any certificate or entry duly made, and our attention has not been called to any statute or rule of court in California making them such.

In the petition for rehearing it was said that the treaty made the decision in *Carter* v. *Insurance Company* controlling, and if that could be considered as a compliance with § 709, which we do not think it could, it came too late, and the petition was denied without an opinion. In doing so that court adhered to the usual course of its judgments, and its action cannot be revised by us. If the Supreme Court of California had seen fit on that petition to entertain the contention of plaintiff in error as asserting a Federal right, and had then decided it adversely, the case would have occupied a different position.

Where a State court refuses to give effect to the judgment of a court of the United States, rendered upon a point in dispute, and with jurisdiction of the case and the parties, it denies the validity of an authority exercised under the United States; and where a State court refuses to give effect to the judgment of a court of another State it refuses to give full faith and credit to that judgment. The one case falls within the first class of cases named in § 709 and the other within the third class.

Where a judgment of another State is pleaded in defense, and issue is made upon it, it may well be ruled that that sets up a right under the third subdivision, because the effect of the judgment is the only question in the case, but here the plea of the decree of divorce and the statute did not necessarily suggest or amount to a claim under the treaty. They were properly admitted in evidence under the State law for what they might be worth as a defense, but that did not involve the assertion of an absolute right under the treaty.

The Supreme Court of Hawaii in its second opinion in the administrator's case said that the company, not having brought Mrs. McGrew in by interplea, must rely on the courts of California taking the same view that the courts of Hawaii did, but did not intimate that the courts of California were compelled by treaty to take that view.

Nor can this failure to claim under the treaty be supplied by judicial knowledge. We so held in *Mountain View Mining and Milling Company* v. *McFadden*, 180 U. S. 533, where we ruled that judicial knowledge could not be resorted to to raise controversies not presented by the record; and Professor Thayer's Treatise on Evidence was cited, in which, referring to certain cases relating to the pleadings and matters of record, it was said "that the right of a court to act upon what is in point of fact

known to it must be subordinate to those requirements of form and orderly communication which regulate the mode of bringing controversies into court, and of stating and conducting them." *Arkansas* v. *Kansas and Texas Coal Company*, 183 U. S. 190.

That rule must necessarily govern us in passing on the question of our appellate jurisdiction under § 709.

The Supreme Court of California held that the Hawaiian statute had no force in California "except by comity;" accorded full effect to the decree of divorce as dissolving the bond of matrimony, but decided that Mrs. McGrew was not affected by the statute because she was not domiciled in Hawaii, and was domiciled in California, when that decree was rendered, and when the statute could have operated if she had been domiciled in Hawaii; and that the statute "had no operation upon her or her personal property here; for the law which governs personal property is the law of the domicile." As to whether a Federal question was involved at all, see *Roth* v. *Ehman*, 107 U. S. 319; *Roth* v. *Roth*, 104 Ill. 35; Württemburg Treaty, 1844, Comp. Treaties, (1899,) 656.

It is argued that by the judgment against the company in favor of McGrew's administrator, the Hawaiian courts had adjudicated that Mrs. McGrew's title passed to the administrator. But Mrs. McGrew was not a party to that action, and was not bound by it, so that it could be pleaded against her. The insurance company did not litigate the question of ownership on her behalf and was in no way authorized to represent her. In any point of view we return to the contention that it was in virtue of the treaty that the California courts were obliged to accept the Hawaiian decisions, and the record fails to show that a right or title was set up thereunder.

2. The second question indicated by plaintiff in error is that the decision was in conflict with § 1 of Article IV of the Constitution, providing that full faith and credit in each State shall be given to the public acts, records and public proceedings of every other State, as carried out by § 905 of the Revised Statutes, because it is insisted that prior to the decision this constitutional provision applied to Hawaii, and should be regarded as an enlargement of and connected with the alleged claim of right under the treaty. But an alleged right under a treaty between two foreign nations is inconsistent with an alleged right arising under the Federal Constitution, and as a right under the Constitution it was not at any time or in any way brought to the attention of the State courts. The judgment of the trial court was rendered October 11, 1897. The resolutions of annexation were passed July 7, 1898. The act to provide a government for Hawaii was passed April 30, 1900. By this act it was provided that the laws of Hawaii, not inconsistent with the Constitution and laws of the United States, or the provisions of the act, should remain in force,

subject to repeal or amendment, but the act forfeiting the wife's property was repealed May 12, 1896. Laws Hawaii, 1896, p. 70.

The judgment of the Supreme Court of California was rendered February 28, 1901, and we cannot retain jurisdiction on the ground of the assertion of a Federal right which did not exist when the judgment was rendered in the trial court, and which was not brought to the attention of the highest court of the State in any way whatever.

Writ of error dismissed.

Mr. Justice PECKHAM took no part in the consideration and disposition of this case.

Mr. Justice WHITE dissented.

True copy.

Test:

Clerk Supreme Court, U. S.